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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRELL TAYLOR,

Defendant and Appellant.

B205022

(Los Angeles County  
Super. Ct. No. BA315081)

APPEAL from a judgment of the Superior Court of Los Angeles County.

George G. Lomeli, Judge. Affirmed with directions.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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After trial by jury, Terrell Taylor was convicted of second degree robbery (Pen. Code, § 211);<sup>1</sup> carjacking (§ 215, subd. (a)); and misdemeanor assault (§ 240). He contends he was improperly sentenced to a concurrent term on the assault, and that imposition of consecutive terms for robbery and carjacking violated the rule in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We conclude he was improperly sentenced to a concurrent term on the assault, but find no *Cunningham* error.

### FACTS

On August 12, 2006, at approximately 9:30 p.m., Victor Zapotitla was driving his car, working for Domino's Pizza, when he was flagged down by a woman on a driveway where he was set to deliver a pizza. He rolled down the passenger window of his car and asked the woman if she had ordered pizza. She said she had so he turned off the engine, got out of the car, picked up the pizza order, and walked toward her. As he was handing soda to the woman, Terrell Taylor walked up to him and put a gun against his right back side. Taylor foraged through his pockets and retrieved his keys and cash; Zapotitla did not fight as he was afraid for his life. The woman and Taylor were talking between themselves. Taylor then walked to Zapotitla's car, got inside, and tried to start it. Zapotitla ran to the car, and opened the partially closed driver's side door. Taylor again pointed the gun at him. Zapotitla grabbed the hand with which Taylor had the gun and struggled with him. Taylor released the gun toward the passenger side floorboard of the car. Zapotitla and Taylor continued to fight inside the car for about 30 seconds and then the woman came up from behind and pulled his hair twice. On the second pull, Zapotitla fell backwards, out, and under the car. Taylor began looking for the gun and Zapotitla got up and ran away. Zapotitla lost \$60 cash he had on his person, \$300 he had in his wallet in the glove compartment, his identification and credit cards, and bags from Domino's worth approximately \$150.

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<sup>1</sup>

All further statutory references are to the Penal Code.

Taylor was arrested in the same car three days later. He was found by police sitting in it, double-parked in the street, blocking traffic. Zapotitla identified Taylor as his assailant from a photo six-pack shown to him earlier by police, and in court. He did, however, misidentify a photograph of another person at the preliminary hearing as the perpetrator.

Taylor testified in his own behalf and denied any involvement in the crimes. Though he did not tell the detectives at the time of his arrest, he paid \$25 to borrow the car he was found in from his friend “Dejohn” and had no idea it was stolen.

Taylor was charged in counts 1 through 3 respectively with second degree robbery (§ 211); carjacking (§ 215, subd. (a)); and assault with a firearm (§ 245, subd. (a)(2)). It was further alleged in counts 1 and 2 that he used a firearm in the commission of the offenses. (§ 12022.53, subd. (b).) After trial by jury, Taylor was found guilty of second degree robbery, carjacking, and the lesser included offense of assault as a misdemeanor. The firearm use enhancements were found not true.

Probation was denied and Taylor was sentenced to an aggregate six-year prison sentence, as follows: the middle base term of five years on the carjacking, and a consecutive one-third the middle base term of one-year term for the robbery. As to count 3, the court imposed six months in the county jail and ordered it to run concurrent.

## **DISCUSSION**

### **I. Sentence on Count 3 Should Have Been Stayed**

Appellant contends, respondent concedes, and we agree that sentence for the misdemeanor assault in count three should have been imposed and stayed pursuant to section 654. That section precludes the imposition of multiple punishments for the same criminal act or course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) If section 654 applies to a particular count, the court is to impose the term normally applicable to the crime, and stay the sentence; it does not allow for concurrent sentences. (*People v. Deloza*, at p. 592.)

In this case, it is apparent Taylor did not have an objective independent of the robbery or carjacking when he committed the assault. The assault on Zapotitla was perpetrated to facilitate retaining Zapotitla's cash or to take his car, and was thus incidental to the robbery and the carjacking. As such, the abstract of judgment is ordered amended to reflect that the six-month sentence for the misdemeanor assault in count three is stayed pursuant to section 654.

## **II. Consecutive Sentencing on Count 1 Was Appropriate**

Taylor acknowledges that in *People v. Black* (2007) 41 Cal.4th 799, 820-823, the California Supreme Court held *Cunningham* simply does not apply to the decision to run sentences consecutive. He nonetheless argues his consecutive sentence in count 1 was unconstitutional, in violation of his United States Constitution Sixth Amendment right to a trial by jury, "to preserve [the issue] for federal review." And so he has. We will follow the dictates of precedent, as we are bound to, and reject his contention. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### **DISPOSITION**

The judgment is affirmed. The trial court is directed to issue an amended abstract of judgment reflecting that the six-month sentence for the misdemeanor assault in count 3 is stayed pursuant to section 654.

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BIGELOW, J

We concur:

RUBIN, Acting P. J.

FLIER, J.